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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1207

ROBERT ALAN LAWRENCE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J. B. TIETZ,
410 Douglas Building,
Los Angeles 12, California,
Attorney for Petitioner.

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Southern District of California, Central Division, convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is in the Record, pages 11-22. It is also set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The judgment of the Court of Appeals was entered on December 16, 1966 [R. 23];* also see Appendix B to this petition. This Petition for Writ of Certiorari is filed within the required thirty days' time, as extended by order of Mr. Justice Douglas (Appendix C).

The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The district court had jurisdiction under 18 U.S.C. § 3231.

3. QUESTION PRESENTED AND HOW RAISED

The sole question presented is whether a Selective Service System registrant, raising his claim for a conscientious objector classification for the first time after receiving an Order to Report for Induction (SSS Form No. 252), is, nevertheless, entitled to the procedural safeguards provided in section 6 (j) of the Universal Military Training and Service Act, 50 U.S.C. App. § 456 (j).

4. STATUTES AND REGULATIONS INVOLVED

Involved are the First Amendment, § 456 (j), of the Universal Military Training and Service Act of 1951, as amended (50 U.S.C.A. App.) and 32 C.F.R. § 1625.2. They are set forth in Appendix D.

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*R. refers to the Transcript of Record.

5. STATEMENT OF THE CASE

The indictment charged petitioner with a violation of the Universal Military Training and Service Act, 50 U.S.C. App. § 462 [R. 2-]; that he became a registrant of Local Board No. 83 of the Selective Service System in the County of Los Angeles, State of California and that having theretofore been duly classified in Class I-A, did knowingly refuse and fail to comply with the order of his said Local Board No. 83 to submit to induction into the armed services of the United States [R. 2].

Petitioner pleaded not guilty, waived jury trial and was tried on November 30, 1965 [R. 4]. A written motion for judgment of acquittal was filed [R. 3]. The motion was denied and the petitioner was found guilty on November 30, 1965, and on the same day was sentenced and admitted to bail pending appeal [R. 4].

The motion contained all of the grounds that the appellant relied upon for reversal of the judgment in this case [R. 3].

6. THE FACTS

Appellant registered with Local Board No. 83 on January 19, 1962 [Ex. 1-2].*

On April 7, 1964, he executed and filed the Classification Questionnaire (SSS Form No. 100), answering all questions that were applicable to him [Ex. 4-9].

On June 8, 1964, the local board classified him in Class I-A [Ex. 11].

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*Ex. refers to the Government's Exhibit, the selective service file of appellant. The pagination is ordinarily pencilled at the bottom of each sheet of the exhibit.

On April 26, 1965, the local board mailed him an Order to Report for Induction [Ex. 11, 18].

On June 28, 1965, he asked for and was given the Special Form for Conscientious Objector. He executed it and filed it with the local board on June 30, 1965 [Ex. 11, 35-44].

The local board disposed of his claim perfunctorily, depriving him of the opportunity to secure the appellate opportunities provided by the Act [Ex. 11].

7. REASONS FOR GRANTING WRIT

POINT I

The conflict of viewpoint between the Second and the Ninth Circuits requires resolution.

The sole question raised by this petitioner calls for resolution of the conflict between the Second Circuit's *Gearey* decision (*Gearey* v. *United States*, 368 F.2d 144, 2 Cir., 1966) and the Ninth Circuit's decision in petitioner's case.

The question is a national one because (1) the reach of the Selective Service System is into every hamlet; (2) the "calls" for induction show every indication of continuing; (3) the percentage of registrants professing conscientious objections to war, is not decreasing, and therefore numerically more persons are affected by the conflict in the law and (4) it is a known fact that most people do not cross bridges or make hard decisions until confronted with them, youth especially. Therefore, the question of "late" filing is one that frequently arises in all federal district courts and is crucial to the liberty of all involved, outside of the Second Circuit.

At present, in the eastern states of the Second Circuit it is recognized, as stated by the unanimous court "The

realization that induction is pending, and that he may soon be asked to take another's life, may cause a young man finally to crystallize and articulate his once vague sentiments." [150, of *Gearey*].

At present, in the western states of the Ninth Circuit it is unclear what respect and consideration is to be given to the rationale above expressed, and this is true also in all other parts of the country.

8. ARGUMENT

A. Intent of Congress

Congress intended that registrants professing conscientious objections to bearing arms be given special administrative consideration. All other administrative appeals go directly to the Appeal Board, for immediate decision. 32 C.F.R. § 1626, et seq. Although the record in this case does not have anything on the following subject, we can present persuasive court records to show that the volume of work, in the relatively short time these boards devote to the work, results in short shrift to the *ordinary* appellant.

The administrative appeals of those registrants professing conscientious objection, however, get a good, careful, congressionally provided special appellate procedure. Congress so directed by Title 50, U.S.C. App. § 456 (j) and the President implemented the intent of the act in 32 C.F.R. § 1626.25.

This special procedure includes a lengthy and thorough inquiry by the F.B.I. Interviewed are the registrant's neighbors, teachers, class mates, employers, etc. He then is given an open-end [unhurried] hearing by a lawyer, a department of justice hearing officer. Thirty or more

days before this hearing he is sent a resume of the inquiry and informed he may rebut or explain any derogatory statements in it by his own statements, affidavits, letters, witnesses and may even bring a lawyer, a privilege he is forbidden to have at any Selective Service System hearing.

Thereafter, his claim is reviewed by a Department of Justice specialist in Washington [also a lawyer], who composes a three page, single-space analysis and recommendation to the Appeal Board. The registrant is sent a copy of this letter, in time to study it and send in a rebuttal, if he so desires, within 30 days.

Petitioner Lawrence had none of the above opportunity.

It need not be argued that this deprivation was prejudicial. However, we must meet the argument that will be made, namely (1) that a deadline is desirable from an administrative point of view, (2) that one has been established [32 C.F.R. § 1625.2. See Appendix D], that the Order to Report for Induction is the deadline point and (3) petitioner's evidence came in after the deadline.

We concede all the above but urge that with respect to this class of registrants the deadline provision of the regulation is contrary to the intent of Congress.

Congress declared in § 456 (j) of the Universal Military Training and Service Act, 50 U.S.C. App., that:

> "*Nothing* contained in this Title shall be *construed* to require *any* person to be subject to combatant training and service in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." (Emphasis added).

We argue that the deadline regulation is in derogation of the act, and, with respect to this one class of registrants is void.

(1) Court Opinions

There has been some debate and difference of opinion in the lower courts over this but it is novel to the Supreme Court.

The Ninth Circuit earlier took a position in *Boyd* v. *United States,* 9 Cir., 1959, 269 F.2d 607, similar to its present one in petitioner's case and there is at least one trial court opinion agreeing, *U. S.* v. *Monroe,* S.D. Calif. 1957, 150 F. Supp. 785.

On the other side, in addition to *Gearey* (which we will comment on at length), there are several well-reasoned opinions supporting our view:

In *United States* v. *Underwood,* 151 F. Supp. (E.D. Pa. 1955), the court held:

> "Regulation 1625.2 is clear. We believe Sec. 6 (j) of the Act, 50 U.S.C.A. Appendix, Sec. 456 (j), is equally clear. That section provides: 'Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reasons of religious training and belief, is conscientiously opposed to participation in war in any form.' It is plain that a person meeting the conditions of the above section of the Act is not to be subjected combatant training and service. This privilege is not to be defeated by procedural regulations. *Nowhere in the Act does it provide that unless the registrant makes his claim before the notice of induction he thereafter waives his right to the privilege. Had congress so intended, it would have set forth such intention in unmistakable terms.* See United States ex rel. Hull v. Stalter, 7 Cir., 1945, 151 F.2d 633, 635; United States v. Clark, D.C. W.D. Pa. 1952, 105 F. Supp. 613, 615. Although in both of the cited cases the claim of conscientious objector was made prior to the time notice

> for induction was sent, the reasons given in support of the holdings apply to the present criminal action." (Emphasis added) [876].

United States v. *Crawford,* N.D. Calif. 1954, 119 F. Supp. 729:

> ". . . the sole legal question before the Court is whether an executive regulation may circumvent the clear language of the statute. To pose the question is to answer it. While Regulation 1625.2 is not invalid on its face, it can have no applicability to a claim of conscientious objection, *whenever made,* so as to deprive the objector of a hearing at which he may prove his good faith." (Emphasis added).

Boyd v. *United States, supra,* expressed disapproval of *Crawford,* but *the correctness of Underwood has never been questioned by the Third Circuit. Underwood* has been expressly followed in the most recent decision on this point in the Eastern District of Pennsylvania, *U. S.* v. *Vick,* unreported (E.D. Pa. Cr. #2292, Sept. 22, 1965, per Judge Luongo). That the District Judges in the Third Circuit do not agree with the Ninth Circuit, and find no authority in the Third Circuit compelling them to accept the Government's argument, is indicated not only by *Underwood* and *Vick,* but also by direct holdings and persuasive dicta of District Judges in the Western District of Pennsylvania, and the District of New Jersey. See *United States* v. *Zasadni,* 206 F. Supp. 318, 221, n. 3 (W.D. Pa. 1962) (distinguished on facts, but *Underwood* implicitly approved in case where "registrant, after being ordered to report, for the *first* time claimed to be a conscientious objector"); *United States* v. *Brown,* 129 F. Supp. 237, 238 (D. N.J. 1955) (validity of § 1625.2 seriously questioned); *United States* v. *Clark,* 105 F. Supp. 613, 615 (W.D. Pa. 1952) (regulations limiting right of appeal must give way where "An Act of Congress creates that right without

any express limitation. . ."); see also *Sorenson* v. *Selective Service System*, 203 F. Supp. 786, 792 (E.D. Pa. 1962) (citing *Underwood*, "When a registrant comes within the provisions of that statute, his privilege cannot be defeated by a procedural regulation. . .").

Additionally, the Third Circuit, in a case involving a claim for deferment as a divinity student, has held that notwithstanding § 1625.2, it is the Local Board's *duty* to reopen and consider on the merits a changed status resulting from enrollment in divinity school,

> "even though, as here, an order to report for induction has been sent to the registrant, provided he has not yet been inducted." *United States ex rel. Berman* v. *Craig*, 207 F.2d 888, 891 (3d Cir. 1953).

The intent of Congress clearly was that this class of registrants be given all appellate opportunities, not short-circuited.

(2) Law Review Articles

Commentators, as well as courts, have reached this conclusion:

> ". . . the tenor . . . .[of the statute] . . . suggests that the right to claim an exemption was intended to be available up to the moment of induction. . . ." Clancy and Weiss, "The Conscientious Objector Exemption: Problems in Conceptual Clarity and Constitutional Considerations", 17 Maine L. Rev. 143, 146 (1965).

The Yale Law Journal agrees:

> "There are strong arguments from the language of this and other portions of the conscientious objector statute which suggest a construction conferring absolute immunity from combatant or, in some cases, non-combatant service upon any individual who

demonstrates in a compliant manner his bona fide reaction to participation in military service. An attitude favoring granting of the exemption is further indicated by the provision for special procedural safeguards against limitation by hostile claim boards *or presidential re-definition of the matter.* And the absence of a Congressional distinction between objectors who come to realization of their beliefs early and those whose objections become firm in later years suggests a disinclination to discriminate on the basis of the age of choice, as long as the choice is honest." (Emphasis added and footnotes omitted).

* * *

". . . the structure of the statute strongly suggests induction as the intended ultimate date for reopening of classification. Courts denying the applicability of Regulation 1625.2 to conscientious objectors have relied on the absoluteness of the exemption, fastening upon the statement of section 6 (j) that 'Nothing contained in this [Act] . . .' shall require subjection to combatant training and service of any conscientious objector whose beliefs are religiously based. The prohibitive impact is increased when this phrase is read in the context of the scrupulous care which Congress has taken elsewhere in the statute to ensure that no good faith claim for the exemption will be refused. Unlike unsuceessful claimants for any other exemption, the conscientious objector claimant is given a statutory right to appeal. Similarly, his appeal is first referred to the Department of Justice 'for inquiry and hearing' and the Department then submits its findings to the appropriate Selective Service Appeal Board. Moreover, in making this inquiry the Department of Justice is instructed to look, not to the length of time during which the objector has had his religious feelings, but to his good faith at the present moment. This participation of the Department of Justice is apparently designed to introduce a governmental agency less intimately associated with the armed forces than the

> Selective Service System and less hostile to the granting of conscientious objector status. Such intrusion of a disinterested investigative body into the appeals hierarchy is unique to the conscientious objector exemption and further signifies the pronounced congressional solicitude for those who seek the exemption." (Footnotes omitted). "Pre-Induction Availability of the Right to Claim Conscientious Objector Exemption," 72 Yale L.J. 1459, 1460, 1465-1466 (1963).

(3) Supreme Court Expressions

This Court has already taken a close look at the administrative remedies provided by Congress. *Estep* v. *United States*, 327 U.S. 114, 122-123 (1945).

In *Estep* a vigorous attack was made on the constitutionality of denial of judicial review on the merits, and it received serious consideration by the Court, as is apparent from Mr. Justice Douglas' majority opinion, and the concurring opinions of Mr. Justice Murphy, Mr. Justice Rutledge, and Mr. Justice Frankfurter.

Narrow judicial review was sustained, but only after the Court carefully scrutinized the entire Selective Service process, and noted all of the administrative remedies available. This is rendered most explicit in Mr. Justice Frankfurter's concurring opinion, 327 U.S. 114, 134 at pp. 137 and 144:

> "Congress deemed it imperative to secure a vast citizen army with utmost expedition. It did so with due regard for the individual interests by giving ample opportunities, within the elaborate system which it established, for supervision of the decisions of the multitudinous draft boards on the selection of individuals for service."

* * *

". . . Congress also authorized an appeal from the local board to an appeal board and ultimately to the President. *Congress has not given to the local board authority to decide when such statutory rights of appeal may be availed of,* nor to make 'final' unwarranted action by a board whereby such appeal is frustrated. . . . Accordingly, if a registrant does not obey an order of induction because the board has cut off the opportunity which the statute gives him to appeal to higher authority, his obligation of obedience has not yet matured. Therefore he has not yet failed to discharge his obligation under the Act. The duty to obey is not merely a duty to obey an order of the draft board, but to obey such an order after it is no longer subject to review within the Selective Service System." [Emphasis supplied].

Thorough administrative review, as the justification for restricting judicial review, is both explicit and implicit in later decisions of the Supreme Court. Thus, in *Witmer* v. *United States,* the Court emphasized in detail the entire administrative scheme immediately prior to restating the absence of direct judicial review, 348 U.S. 375, at 376-377. In *Simmons* v. *United States,* the Court reiterated, in several places, the crucial necessity of a fair hearing, "in accordance with the statutory plan and the concepts of basic fairness . . .", 348 U.S. 397, at 405. And in *Gonzales* v. *United States,* the Court stressed that a pre-condition of administrative finality was a meaningful hearing and appeal, 348 U.S. 407, at 412-413.

The teaching of the Estep case is that anything less than the full administrative review may raise grave constitutional questions. Mr. Justice Douglas' majority opinion evinces this concern, 327 U.S. 114, at 119-120. And in *Simmons* v. *United States, supra,* the court characterizes the requirement of a fair hearing as a "fundamental safeguard." 348 U.S. 397, at 406.

Petitioner in this case was denied all of his valuable rights of administrative review—rights which, if afforded him, might very well have resulted in his receiving the conscientious objector classification which he sought.

An administrative regulation which is "out of harmony with the statute is a mere nullity"; *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129, 134 (1936). *Accord*: *U. S.* v. *Maxwell*, 278 F.2d 206, 211 (8th Cir. 1960); *U. S.* v. *Eddy Brothers, Inc.*, 291 F.2d 529, 531 (8th Cir. 1961); *Functional Music, Inc.* v. *F.C.C.*, 274 F.2d 543, 548 (D.C. Cir. 1958), cert. den. 361 U.S. 813 (1959); *Boykin* v. *Commissioner of Internal Revenue*, 260 F.2d 249, 254 (8th Cir. 1958). "A right clearly created by statute cannot be taken away by regulation." *Northern Natural Gas Co.* v. *O'Malley*, 277 F.2d 128, 134 (8th Cir. 1960).

B. Constitutional Considerations

There is a further constitutional consideration. Regardless of whether or not there is a constitutional right to be recognized as a conscientious objector, the statute providing for exemption is a law which protects religious liberty. *Olvera* v. *U. S.*, 223 F.2d 880, 883 (5th Cir. 1955). And there is no doubt that once the statutory right has been established, there can be no discrimination as between varieties of religious belief, so long as the statutory standard is met. See *United States* v. *Seeger*, 380 U.S. 163 (1965).

The recent decision of the United States Supreme Court in *U. S.* v. *Seeger, supra*, provided a broader basis for conscientious objection than that which previously existed. No longer may local boards entertain any suspicions towards claims of conscientious objection which are made by persons who are not members of recognized pacifist churches, or who do not have a long family or

personal history of conscientious objection. It is obviously much easier for a person who had been reared as a Quaker to decide whether or not he is a conscientious objector than it is for a person who must arrive at his decision through independent religious training, belief and thinking. Consequently, such rationale as might have existed prior to *Seeger, supra,* based on an assumption that a person should know if he is a conscientious objector at a relatively early stage in the process, does not exist for registrants of the *Seeger* category.

The Selective Service System recognizes the right of conscientious objection, so long as it is asserted prior to its arbitrarily-imposed cut-off date. Defense Department regulations provide a procedure for the evaluation and determination of post-induction claims of conscientious objection. Department of Defense Directive No. 1300.6, Aug. 21, 1962. But under this scheme, no provision is allowed for the bona fide development of conscientious objection during this interstitial period. This is in effect a denial of religious liberty during such period.

The rationale of *Boyd, supra,* is succinctly stated at the conclusion of the opinion:

> "There must be some end to the time when registrants can raise a claim of conscientious objection to induction, and raise and re-raise an alleged right of review. Any other conclusion would result in chaos." (*Id.* at 612).

This concern about possible chaos does not withstand analysis. First, the total number of men seeking conscientious objector deferment has always been very small,*

*The Court recognized this fact in *Kennedy* v. *Mendoza-Martinez,* 83 S.Ct. 554, 576, for, in its conclusion, the Court observed: "Thus our holding today does not frustrate the effective handling of the problem of draft evaders who leave the United States" and in a footnote to this comment it showed "42. Moreover, the problem is relatively extremely small." [figures given].

and there is no reason to believe that allowing late claimants an opportunity to try to prove their cases will substantially increase the number. Second, a deliberate bad faith applicant, a draft dodger who presents a sham or frivolous claim, will be more likely to present it well within the time limit. Therefore, the persons most likely affected by the cut-off date are the sincere ones who are slow in reaching what must be an awesome decision. Third, as the Yale Law Journal has pointed out:

> ". . . if delay is the major problem, an expedited process of hearing and appeal could be instituted without denying a registrant the right to a hearing and appeal on his claim for exemption." 72 *Yale L.J.* 1459, 1468.

The Journal points out a system could be devised whereby post-notice claimants would receive priority attention. *Ibid.* n. 50. Cf. Title 50, U.S.C. App. § 462 (a), which provides for such priority attention to the trial of Selective Service cases.

Concerning the possible implication that the late filer is insincere:

Messrs. Clancy and Weiss answer that argument in their article in the Maine Law Review, cited *supra*:

> "But of what relevance is the time at which a man announces his objection to war? Should he be condemned if he changes his mind or announces his objection when the draft board announces his impending service? On what reasoning does the condemnation flow? Is it not possible that the impending concrete experience crystallizes his formerly vague sentiments or impels him to state them? Can it be said absolutely that a man is not a sincere objector because his objection originated at draft age, or even at the pre-induction center?"* 17 *Maine L. Rev.* 143, 147.

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*See *Corrigan* v. *Secretary*, 9 Cir., 1954, 211 F.2d 293, for an instantaneous, *last minute* (at *induction*) conversion.

The Yale Law Journal argues that:

> ". . . the regulation is unreasonable as not consonant with the realities of the decision-making processes that conscientious objectors undergo." 72 *Yale L.J.* 1459, 1462.

It continues:

> "Many claims during the post-Order, pre-induction period might be thought to be spurious, prompted more by momentary fears than by deep conviction. Arguably, the typical candidate has had over twenty years to reconcile his beliefs in a Supreme Being with his obligations to perform military service. However, the impact of the Selective Service System structure upon the individual may well be such that the individual may, quite honestly, not be confronted with the final decision until the very weeks surrounding the Order to Report for Induction. An individual's conviction that he is a conscientious objector arises from a constellation of experiences in a family and church setting. It is implausible to assert that any one event in an individual's life is more determinative of his ultimate religious conviction than many others. Given the importance of the decision to claim an exemption, and the social stigma which often attaches to conscientious objector status, it is understandable that many registrants would hesitate to claim the exemption until they felt certain of their own convictions and realized, because of the immediacy of the pre-induction procedures, the inevitablility of a clash between their religious beliefs and combatant activity." (*Id.* at 1463-1464).

C. The Gearey Decision

The unanimous decision of the Second Circuit, in *Gearey, supra*, is strong evidence for acceptance of our thesis.

Appellant Gearey squarely presented the question that concerns us. The Second Circuit said: "On this appeal his principal contention is that although his claim of conscientious objection was not raised prior to receiving a Notice to Report for Induction (SSS Form No. 252), he was nevertheless entitled to the procedural safeguards provided for those claiming to be conscientious objectors in section 6 (j) of the Universal Military Training and Service Act, 50 U.S.C. App. § 456 (j)." [368 F.2d 144, 146].

The Second Circuit then made a review of the facts including the local board's explicit and devastating finding: "Upon the conclusion of the July 6 hearing, the Board informed Gearey that it believed he was not a 'genuine c.o.' and that the facts did not warrant a change in his classification." [147].

The appellate court next reviewed the statutory provisions and the administrative "deadline" regulation [32 C.F.R. § 1625.2. This is Appendix D of this Petition]. After concluding that such a regulation is, generally, an administrative necessity it specifically considered the application of the regulation to those registrants professing conscientious objections. It divided such men into two classes: one, where their views fully matured before the deadline order and the other, where their views fully matured after the deadline order.

The first class is admittedly blocked from either administrative or judicial relief by the deadline order; the second class is not to be blocked, the Second Circuit concluded, for this was not the intent of Congress.

The competing judicial authorities on this crucial phase of the subject were then reviewed, in the text and footnotes [150].

The court then gave its viewpoint: "The realization that induction is pending, and that he may soon be asked to take another's life, may cause a young man finally to crystallize and articulate his once vague sentiments."

The Ninth Circuit's disagreement with this viewpoint of the *Gearey* court in *Parrott* v. *United States*, ... F.2d ....., decided December 12, 1966, was superficial, we respectfully submit. Its argument that "Were it to be followed blindly, there could be no workable Selective Service System" ignores (1) the limited nature of the Second Circuit's holding, (2) the limited number of registrants that could possibly be involved and, (3) that there is an easy cure for abuse. This was pointed out in the discussion above, of the *Boyd* decision and of the Yale Law Journal article under the head "B. Constitutional Provisions."

Finally, concerning the relative respect to be accorded the *Parrott* and the *Gearey* opinions it is to be noted that the Ninth Circuit had no briefing on this "late filing" subject (only a passing reference to the *Gearey* decision, made during oral argument) whereas the Second Circuit had the benefit of thorough briefing.

D. Guide to Construction of the Act

The Fifth Circuit in *Williams* v. *United States*, 5 Cir., 1954, 216 F.2d 350, stated it this way:

> "Congress in its wisdom considered it more essential to respect a man's religious belief than to force him to serve in the armed forces. The draft boards and the Courts are bound to carry out that policy." [352].

We presume to submit that the following is the proper guide which this Court should use in construing the conscientious objector statute. It is that set out by Mr. Justice

Frankfurter, in a not unrelated context in his dissenting opinion in *United States* v. *Nugent*, 346 U.S. 1 (1953):

> "Considering the traditionally high respect that dissent, and particularly religious dissent, has enjoyed in our view of a free society, this Court ought not to reject a construction of congressional language which assures justice in cases where the sincerity of another's religious conviction is at stake and where prison may be the alternative to the abandonment of conscience. The enemy is not yet so near the gate that we should allow respect for traditions of fairness, which has heretofore prevailed in this country, to be overborne by military exigencies." [12-13].

CONCLUSION

For the reasons given certiorari should be granted and the judgment should be reversed.

Respectfully,

J. B. TIETZ,
410 Douglas Building,
Los Angeles 12, California,
Attorney for Petitioner.

March 30, 1967

APPENDIX A

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH CARL PARROTT, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee.*	No. 20,730
ROBERT ALAN LAWRENCE, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee.*	No. 20,746
TERRY ALLAN WOLFE, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee.*	No. 20,927
LEONARD RALPH WALKER, II, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee.*	No. 20,926

[December 16, 1966]

Appeal from the United States District Court
for the Southern District of California
Central Division

Before: BARNES and KOELSCH, Circuit Judges; THOMPSON, District Judge

BARNES, Circuit Judge:

This is a consolidated appeal from four convictions (two by juries and two by judges) of the four appellants herein charged with violations of the Universal Military Training and Service Act, 50 Appendix U.S.C. § 462.

Jurisdiction below rested on that statute and 18 U.S.C. § 3231. Jurisdiction exists here pursuant to 28 U.S.C. § 1291.

Parrott was charged with failure to perform civilian work; Lawrence and Wolfe with refusal to submit to induction; and Walker (in two counts) with failing to report for induction, and failing to notify his local draft board where mail could reach him. Walker received two concurrent three-year sentences; each of the others one three-year sentence.

Each appellant professed conscientious objections to war. Parrott was so classified, but subsequently refused to do civilian work required of conscientious objectors.

Two principal questions are raised—error in admission of evidence, and the failure to grant motions for acquittal. The common evidentiary question existing in all four appeals is the claim the court erred in admitting the Selective Service System file (Exhibit 1) into evidence. We consider it first.

I. The admission of certified copies of the appellants' files.

The government introduced these files (three being photo copies and one an original) each with a certificate attached. No objection is made to the form or contents of

any authenticating certificate, save that it "is a thin paper sheet". No case is submitted by appellants as authority for the objection urged. Appellants suggest that if several persons have at various times been temporary lawful custodians of the file, the certificate of but one such person that it is in his custody is valueless. Again no law is cited.

The point is completely without merit. (Cf. Rule 27, Federal Rules of Criminal Procedure; and Rule 44(a), Federal Rules of Civil Procedure.) Both this circuit and others have authorized the introduction into evidence of duly authenticated copies of the registrant's Selective Service files. *La Porte* v. *United States*, 300 F.2d 878 (9th Cir. 1962); *Yaich* v. *United States*, 283 F.2d 613 (9th Cir. 1960); *Kariakin* v. *United States*, 261 F.2d 263 (9th Cir. 1958); *Olender* v. *United States*, 210 F.2d 795 (9th Cir. 1954); *United States* v. *Borisuk*, 206 F.2d 338 (3d Cir. 1953). Cf. *Wong Wing Foo* v. *McGrath*, 196 F.2d 120, 123 (9th Cir. 1952).

II. Were the classifications improper?

A. The scope of review

The only basis for granting the motions for acquittal would have been the improper classifications of the appellants. Before considering the facts of the cases, however, we must contend with the appellants' assertions as to the standards of judicial review of Selective Service classifications.

1. Appellants first urge generally that the lower courts failed to properly interpret *Dickinson* v. *United States*, 346 U.S. 389 (1953). They state "that the board, '* * * must find and record affirmative evidence that he [the registrant] has misrepresented his case * * *'. . . ." (Appellants' Opening Brief, p. 12.) This is a misquotation.

The *Dickinson* majority opinion states: "The task of the courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities." 346 U.S. at 396.

Mr. Justice Clark then goes on to point out for the majority:

> "Local boards are not courts of law and are not bound by traditional rules of evidence; they are given great leeway in hearing and considering a variety of material as evidence. If the facts are disputed the board bears the ultimate responsibility for resolving the conflict—the courts will not interfere. Nor will the courts apply a test of 'substantial evidence'. However, the courts may properly insist that there be some proof that is incompatible with the registrant's proof of exemption." *Id.* at 396 (note omitted).

The dissenting opinion interprets the majority opinion as requiring that which appellants rely upon, that "the board must find and record affirmative evidence that he has misrepresented his case". The minority then points out there is nothing in the Act which requires this.

We prefer to follow the precise language of the majority opinion—was there in the record *a basis in fact* for denying Dickinson's claimed ministerial exemption? And since the ministerial exemption is a matter of legislative grace, "the selective service registrant bears the burden of clearly establishing a right to the exemption". *Id.* at 395. And since in *Dickinson* all evidence before the board established the exemption, the registrant had met the statutory criteria, and the board could not, without any contrary evidence, simply say it disbelieved him, "even in the absence of any impeaching or contradictory testimony". *Id.* at 396.

2. Appellants next urge generally that the courts below, save as to the Parrott case, "ignore the doctrine of *Witmer* v. *United States,* [348 U.S. 375] 75 S. Ct. 392 (1955), wherein the yardstick of sincerity is made decisive". (Appellants' Opening Brief, p. 12.) *Witmer* v. *United States, supra,* points out that while the ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form (348 U.S. at 381-82), inconsistent statements of the registrant are sufficient to cast doubt on his claim. In that case the Court could not find, following *Dickinson, supra,* that there was no basis in fact for the appeals board's decision in denying Witmer a classification as a conscientious objector. We assume that inconsistent actions, as well as statements, are valid proof of a "basis in fact" for the denial of the requested exemption.

We hold the classifications were proper.

In summary, we agree generally with the government's position that under the Act and the Supreme Court's cases interpreting it, a court may not interfere with a registrant's classification unless it finds that there is *no basis in fact* for the classification, or that the local board acted so arbitrarily and capriciously that the registrant was denied due process. *Dickinson* v. *United States, supra*; *Witmer* v. *United States, supra*; *Estep* v. *United States,* 327 U.S. 114, 122 (1946); *Rogers* v. *United States,* 263 F.2d 283, 285 (9th Cir. 1959); and *Badger* v. *United States,* 322 F.2d 902, 907 (9th Cir. 1963).

B. Parrott

In Parrott's case, the burden on him was not met by him—he did not prove he was more than a part-time or half-time or occasional or irregular minister—he did not prove the ministry was his "vocation". No case is pre-

sented to us where such a meager ministry *requires* a finding it is registrant's vocation. *Dickinson, supra*, at 395.

The judgment of conviction as to Parrott is *affirmed.*

C. Wolfe, Lawrence and Walker

In the cases of Wolfe, Lawrence and Walker, each upon registration did not originally claim to be conscientious objectors.

Wolfe registered on May 23, 1960. His classification questionnaire, filed July 2, 1962, made no claim he was a conscientious objector. On May 14, 1963, a new questionnaire made no such claim. On June 18, 1963, Wolfe was classified I-A, and was so notified. On January 16, 1964, Wolfe obtained a II-S, or student classification, and notice was mailed to him of that classification. On November 16, 1964, he was reclassified II-S, and a notice mailed to him. On January 6, 1965, Wolfe graduated from college and requested a continued II-S classification so he could go to Mexico City to study Spanish. On February 11, 1965, he was classified I-A, and on March 2, 1965, so notified. He made no request for a personal appearance before the board.

On March 15, 1965, the board received a "Current Information Questionnaire" from Wolfe, and no claim of being a conscientious objector was made. He stated he was aware of his eligibility for the draft, but asked a further postponement to complete his education.

On April 1, 1965, the board mailed an order to appellant to report for a physical examination (SSS Form No. 223). Appellant did not file an appeal from his I-A classification within the period provided by the Selective Service regulations. 32 C.F.R. § 1626.2(c)(1) and (3) (1962). On April 27, 1965, the board mailed a second or-

der to appellant to report for his physical examination, having been informed by appellant that he had not received word of the first order to report for physical examination until April 11, 1965.

On May 5, 1965, the board received from appellant a written request for an interview for the purpose of appealing his I-A classification. The basis for his request was not that he was a conscientious objector, but that he wished to return to college to complete the courses necessary for him to obtain a teaching credential. On May 5, 1965, the board noticed that the appellant had requested an interview and appeal but was late in filing the appeal.

On May 25, 1965, a statement of appellant's acceptability for induction into the armed services (DD Form 62) was mailed to appellant. On June 30, 1965, the board mailed appellant an order to report for induction (SSS Form No. 252) (on July 27, 1965). On July 6, 1965, the board received a letter from appellant in which he stated that he wished to notify the board that, "Because of my religious and moral convictions, I cannot have on my conscience the fact that I have trained myself for the killing of human life. . . . I am, therefore, this 3rd day of July applying for classification as a conscientious objector".

On July 12, 1965, the board sent appellant "Special Form for Conscientious Objector" (SSS Form No. 150), which the board received in a completed form from appellant on July 14, 1965. On July 26, 1965, the appellant completed a second SSS Form No. 150 in the office of the board. On July 26, 1965, the board mailed appellant a "Postponement of Induction" (SSS Form No. 264), postponing his induction until further notice. The board postponed appellant's induction to consider his SSS Form No. 150 which he had submitted as the special form for a conscientious objector.

On August 4, 1965, appellant was present at the board's request at a meeting of the board regarding his claim as a conscientious objector. Appellant advised the board ". . . that he had planned to be married in May or June but that it did not work out so he filed a claim as a conscientious objector. He stated the reason he had never claimed it before was not because he was ashamed but because he was afraid that people would laugh at him and criticize him. . . ." On August 4, 1965, the board decided that the ". . . SSS Form No. 150 and the results of the interview did not warrant reopening of the classification". On August 6, 1965, the board mailed a letter to the appellant advising him that the facts presented by appellant did not warrant reopening or reclassification of his case at that time (Form C-140).

On August 9, 1965, the board received a letter from appellant wherein he stated that he continued to consider himself a conscientious objector and ". . . if I am given an induction notice I will report, but I will declare myself a conscientious objector to the army".

On August 10, 1965, the California headquarters of the Selective Service System advised the board by letter that it had reviewed appellant's Selective Service file, and that the postponement of his scheduled induction should be withdrawn and a new reporting date should be established allowing appellant ten days within which to report.

On August 11, 1965, the board received a letter from appellant stating that he was requesting an appeal from the board's decision not to reclassify him. On August 12, 1965, the board mailed a letter to appellant notifying him that the postponement of his induction was terminated, and that the local board had made no change in his classification status after carefully reviewing his SSS Form No. 150 and the August 4, 1965, interview. Appellant was further

advised that his order to report for induction remained in effect, and he was directed to report for induction on August 24, 1965, at 6:30 A.M., to 2100 North Main Street, Santa Ana, California.

On August 24, 1965, appellant reported for induction and on the same date refused to be inducted. After appellant was informed of the criminal penalties involved for a refusal, he was again asked to submit to induction but he refused to be inducted. He gave as his reason that he did not, nor had he ever, believed in military service of any kind. He stated that he did not believe in violence, that he could not conscientiously be a part of the armed services, that he was prepared to go to trial for the defense of his position, and that he could not cooperate in armed training. He said he would "agree to perform an alternative service in accordance with his church".

At the time Wolfe was ordered to report for induction on June 30, 1965, he was properly classified in class I-A, "Available for military service".

Title 32, Code of Federal Regulations § 1625.2 provides in part:

> "The local board may reopen and consider anew the classification of a registrant . . . provided, . . . the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

Here, in order to intelligently find if there has been a status change, due to *uncontrollable* factors, the local board received the registrant's claims, postponed his induction, gave Wolfe a hearing, and determined no change in his classification was warranted. To have refused any

hearing would have been contrary to *United States* v. *Majher*, 250 F. Supp. 106 (S.D. W.Va. 1966), upon which appellant relies.

Appellant's brief assumes that it was discretionary for a local board to reopen, but states what was here done was "in the best light, . . . an abuse of discretion". To prove it, we are referred to two unreported trial judges' opinions which found an abuse of discretion on the facts existing in those cases.

We find no such abuse of discretion on the facts here present. 32 C.F.R. §§ 1625.2, 1625.4, 1641.2(b) (1962). Wolfe received more than the law required of the local board. We can find no arbitrary or capricious action of the board by which the registrant was denied due process.

Wolfe made no effort whatsoever to claim he was a conscientious objector prior to receiving his notice to appear for induction. The board was required to act on the information then before it. Title 32, Code of Federal Regulations § 1625.2, *supra*, would not be necessary, nor be of any legal significance or effect, could "noncontrollable" shifts of opinion or conscience by the registrant be sufficient to *require* a reconsideration or a re-examination of the earlier nonappealed and reasonable classification. *Wyman* v. *La Rose*, 223 F.2d 849 (9th Cir. 1955).

As the Tenth Circuit said in *Keene* v. *United States*, 266 F.2d 378, 383-84 (1959).

> "It does not seem unreasonable or derogatory to the spirit and purpose of the exempting statute to provide by regulation that no request for reopening or reclassification shall be entertained after notice to report for induction is mailed. Otherwise, the whole machinery of the selective service process may conceivably be disrupted by last minute changes in status for purposes of avoidance. Such is the manifest pur-

pose of the proviso in Regulation 1625.2. We think the regulations have application to a conscientious objector's claim as all other claims for a change in status. It seems also entirely consistent with the procedural safeguards provided in the selective service process to say that the circumstances relied on to show a change in status must have occurred after the induction notice was mailed."

We agree with the government that even if the trial court should consider the refusal of the local board to reopen the classification, there was no violation of due process, on the facts before the board. As the government points out:

"Serious question as to the appellant's sincerity is raised by the inconsistencies of his statements and position. The fact that he made no effort to establish his claim until after he was ordered to report for induction suggests that he resorted to the expedient of filing a conscientious objector claim to evade military service and criminal penalty. This possibility is indicated by appellant's statement to his local board that he had planned to be married in May or June, that it did not work out, and so he filed a conscientious objector claim.

"There is sufficient evidence in appellant's claim to form a basis for the inference that appellant's beliefs were actually rationalized, intellectual in their origin, and moral in their fundamental significance. Religious training and belief, in the context of conscientious objection entitling a registrant to exemption from military service, excludes essentially political, sociological, or philosophical views or a merely personal moral code. Title 50, Appendix, United States Code, Section 462.

"Taking all of these factors into consideration, it is apparent that the local board had a basis in fact for its opinion that the facts presented did not warrant reopening or reclassification." (Appellee's Brief (on Wolfe), pp. 22-23.)

While the facts as to Lawrence and Walker differ in some details, the same principles apply to them as to the facts in the Wolfe case. To specify them in detail would unduly prolong this opinion.

D. Wolfe

Appellant Wolfe alleges as a separate ground of error that "he was not given the mandatory warning that refusal to submit to induction was a felony carrying a penalty of five years imprisonment and/or a $10,000 fine." (Appellant's Brief, p. 19.) This position is then modified—so that appellant does *not* assert he was not warned of the precise terms of the penalty, but that he was not warned *between* the two "opportunities" given by the inducting officer.

Appellant relies on the unreported decision of Judge Jertberg of this court (in *United States* v. *Lindsay*, S.D. Calif., 1958, No. 3496-ND). There the court said the warning was insufficient because: "It omits to state that the defendant was informed that the punishment might be by imprisonment for not more than 5 years or a fine of not more than $10,000 or both." The defendant there was informed by letter only that the refusal to be inducted "was a felony . . . and that conviction would subject him to punishment". The nature and severity of the punishment is an essential element of the warning. This is established in *Chernekoff* v. *United States*, 219 F.2d 721 (9th Cir. 1955).

After his first refusal to be inducted (R.T. 43), *i.e.*, refusal to sign the papers, he was taken upstairs and "informed of penalties".

"THE COURT: You were informed of penalties?

"THE WITNESS: Yes.

"THE COURT: What penalties did they tell you?

"THE WITNESS: Five years and/or $10,000."
(R.T. p. 44, lines 5-8.)

He was then asked to take the symbolical step forward, and refused. (R.T. p. 46, lines 5-17.)

We can find no lack of adequate warning as to the precise penalty faced by Wolfe; and we conclude he had not only warning, but full knowledge of the precise penalty.

We fail to perceive the applicability to this case of the holding in *Corrigan* v. *Secretary of Army*, 211 F.2d 293 (9th Cir. 1954).

We find no error in Wolfe's separate specification of error, or in his conviction.

E. Lawrence

Appellant Lawrence has a separate point in his appeal—that he was illegally denied the statutory I-S classification (deferment to end of year of student satisfactorily pursuing a full-time course of instruction).

The record before us shows that the board granted a postponement of induction to Lawrence, classified I-A, on May 20, 1965, to the June 1965 induction call date, believing this was the equivalent of a I-S classification. Appellant urges that it was not the equivalent, because *if* he had been placed in I-S instead of I-A his notice of induction would have been cancelled, and then, upon finishing his schooling, he could have had the opportunity to appeal the presumed I-A status he would subsequently have attained.

But appellant fails to mention that he had notified the local board, on receipt of its first induction notice sent on April 26, 1965, that he would not comply with that order. Nor did Lawrence ever seek a classification as I-S, nor sub-

mit any evidence he was a full time student at any college or university. He was a part time student at the University of Southern California, and had not yet enrolled at San Francisco State College.

Furthermore, he testified his religious views never "crystalized" until sometime in June, *after* his request for a postponement on the ground he wanted from the board, not a total exemption, but merely a stay to the end of the college year.

When his religious ideas might have "crystalized" is a matter of doubt and pure speculation. He was denied nothing to which he was entitled.

Upon oral argument appellant's counsel called to our attention the recent Second Circuit case of *United States* v. *Gearey*, 35 U.S.L. Week 2241 (2d Cir. Oct. 21, 1966). Stated simply, we do not agree with the appellant's interpretation of the holding or the rationale of the Second Circuit. We do not approve of the "crystalizing" theory, unless that crystalization was the only evidence before the board. Were it to be followed blindly, there could be no workable Selective Service System. Why "the realization he may *soon* be called upon to kill may be the catalyst necessary to crystalize a draft registrant's once vague feelings to a clear-cut conscientious objection to war" (*United States* v. *Gearey, supra*) places, in our opinion, too much emphasis and reliance upon the time element. An average man of average intelligence, who can read, must daily realize that he may, once he is subject to a draft call from his board due to his designated classification, be "soon" called upon to kill.

The conviction of Lawrence is *affirmed*.

III. Conclusion

In summary, we quote from a district court judge's resume of his duties in conscientious objector cases:

> "Our judicial review of these administrative proceedings leading to defendant's classification is very limited. Blalock v. United States, 247 F.2d 615 (4th Cir. 1957). The range of review is the narrowest known to the law. Campbell v. United States, 221 F.2d 454 (4th Cir. 1955). The only issues before the Court in his type of case are whether there is shown a denial of basic procedural fairness or whether the conclusion of the board is unsupported by any basis in fact. Witmer v. United States, 348 U.S. 375, 75 S.Ct. 392, 99 L.Ed. 428 (1955); Dickinson v. United States, 346 U.S. 389, 74 S.Ct. 152, 98 L.Ed. 132 (1953); Goff v. United States, 135 F.2d 610 (4th Cir. 1943)." *United States* v. *Majher*, 250 F.Supp. 106, 109 (S.D. W.Va. 1966).

Our review of the cases here presented convince us there was no denial of basic procedural fairness, nor any arbitrary or capricious conclusion made by the local board.

The judgment of conviction in each case is *Affirmed.*

APPENDIX B

United States Court of Appeals

FOR THE NINTH CIRUIT

ROBERT ALAN LAWRENCE,
vs.
UNITED STATES AMERICA,
} No. 20746

Judgment

APPEAL from the United States District Court for the SOUTHERN District of CALIFORNIA and was duly submitted.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the SOUTHERN District of CALIFORNIA and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the ..... judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered December 16, 1966.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. .....

ROBERT ALAN LAWRENCE,
Petitioner,

vs.

UNITED STATES

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 31, 1967.

/s/ W. O. DOUGLAS
Associate Justice of the Supreme Court of the United States

Dated this 27th day of February, 1967.

APPENDIX D

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Universal Military Training and Service Act of 1951, As Amended (50 U.S.C.A. App. § 456 (j).

(j) Conscientious objectors.—Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period—equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appro-

priate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the

appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1207

ROBERT ALAN LAWRENCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial to the court, a jury having been waived (2 R. 4),[1] petitioner was convicted of knowingly refusing to submit to induction into the armed forces, in violation of 50 U.S.C. App. 462 (1 R. 1–2; 2 R. 30). On November 30, 1965, he was sentenced to three years' imprisonment (1 R. 4; 2 R. 34). The court of appeals affirmed the conviction (370 F. 2d 388; Pet. App. A; 1 R. 11–22).

[1] The record on file with the Clerk consists of two separately paginated volumes. One contains the papers filed in the district court and the court of appeals ("1 R."), the other ("2 R.") is the trial transcript. We are lodging with the Clerk a certified copy of the Selective Service file ("S"), which was introduced by the government at trial.

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The government's evidence, consisting of a certified copy of petitioner's Selective Service file (G. Ex. 1,; 2 R. 6), revealed that on January 19, 1962, petitioner registered for the draft with Local Board No. 83 in Los Angeles, California (S. 1–2). On April 7, 1964, he filed answers to a classification questionnaire (S. 4–9), making no claim therein that he was a conscientious objector (S. 7). On June 8, 1964, he was classified 1–A (S. 11). Although aware of his right to appeal (2 R. 10), petitioner took no appeal from that classification (S. 11). On April 26, 1965, a finding of physical acceptability having been made (S. 14–17, 53–67), petitioner was sent an order to report for induction on May 25, 1965 (S. 18). On April 28, 1965, petitioner wrote to the local board, asserting that he could not comply with this order because he would not permit himself "to be trained as a professional killer" (S. 19–20). On May 14, 1965, the local board again sent to petitioner a copy of the order to report for induction (S. 19a). By letter, dated May 19, 1965, petitioner requested a postponement of the induction date so that he could complete "the current school semester"; he also stated that he had been accepted as a full-time student for the coming fall semester at San Francisco State College (S. 21; see also S. 22–25). On May 20, 1965, the local board postponed petitioner's induction until the June 1965 call, to permit him to complete the current school term (S. 27–28). On May 26, 1965, the local board sent petitioner a notice to report for induction on June 22, 1965 (S. 30). Petitioner reported as directed

but refused to submit to induction "on the basis of my personal moral convictions" (S. 32, 33, 48–50).

Six days later, on June 28, 1965, petitioner requested a conscientious objector form (SSS Form No. 150) from his local board (S. 34). In the form, which he filed with the local board on July 8, 1965, petitioner stated that he believed in a Supreme Being (S. 35), that he received the training and belief which provided the basis for his claim "by applying interpretation, organization and reason to everything in life which I have perceived", that he relied upon himself for religious guidance, and that he had given public expression to the views on which he based his claim in his lawyer's office on June 28, 1965 (S. 38). He requested a reopening of his classification. (S. 47). On July 12, 1965, the three members of the local board found that the facts presented did not warrant a reopening of petitioner's classification (S. 11, 72). At trial, petitioner testified that the reason he had not made his conscientious objections known before receiving the notice to report for induction was because he had not yet "crystallized" his thoughts into religious beliefs (2 R. 10).

The sole question presented (Pet. 2, 4) is whether petitioner was improperly denied the administrative review and related procedural safeguards provided by Section 6(j) of the Universal Military Training and Service Act (50 U.S.C. App. 456(j)) when his local board declined to reopen his classification upon his claim of conscientious objector status. The petition completely overlooks the fact that petitioner had already committed the offense for which he was con-

victed before he submitted his claim to his local board and requested reopening of his classification. Thus, whatever the merits of petitioner's contentions with respect to the procedures employed by the local board, they are quite irrelevant to the validity of his conviction.

Petitioner relies on a supposed conflict between the decision below and that of the Second Circuit in *United States* v. *Gearey*, 368 F. 2d 144, but the *Gearey* case is clearly distinguishable. The Second Circuit's opinion is concerned with the treatment to be accorded a registrant whose conscientious scruples against bearing arms first crystallize, and who claims exemption, during the period after receipt of a notice of induction and before the date set for induction. Selective Service Regulation 1625.2 (32 C.F.R. 1625.2) expressly prohibits local boards from reopening a registrant's classification after he has been sent an induction notice, "unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." The Second Circuit held that Section 1625.2 was a reasonable regulation "clearly within the bounds" of the statutory rule-making authority (50 U.S.C. App. 460), without which "manpower quotas could rarely be met with any degree of certainty." 368 F. 2d at 149.[2] The court also held in

[2] See, also, *United States* v. *Al-Majied Muhammad*, 364 F. 2d 223 (C.A. 4); *United States* v. *Taylor*, 351 F. 2d 228 (C.A. 6); *United States* v. *Porter*, 314 F. 2d 833 (C.A. 7); *United States* v. *Beaver*, 309 F. 2d 273 (C.A. 4), certiorari denied, 371 U.S. 951; *Boyd* v. *United States*, 269 F. 2d 607, 611 (C.A. 9); *Keene* v. *United States*, 266 F. 2d 378, 384 (C.A. 10).

Gearey that where conscientious objections first mature and are claimed during the interval between notice to report and induction, "then a change in status would have occurred 'resulting from circumstances over which the registrant had no control,' and he would be entitled to be reclassified by the Local Board" (368 F. 2d at 150). The court found that this construction was necessary so as to avoid leaving a gap between the procedures available for investigating claims maturing prior to notice and those provided by the military services for claims arising after induction (368 F. 2d 149 n. 10, 150 n. 11).[3]

Petitioner, unlike Gearey, did not seek reclassification as a conscientious objector prior to the induction date; indeed, he does not suggest that his convictions had sufficiently matured to warrant such a claim by that date. The information supplied by petitioner on SSS Form 150 (S. 38) indicates that it was not until June 28, 1965, six days after he had refused induction, that he first gave public expression to the views, as finally crystalized, on which he based his claim. At the induction center on June 22, 1965, he refused induction solely on the basis of his "personal moral convictions" (S. 32). Petitioner does not contend that such convictions sufficed to bring him within Section 6(j), which expressly excludes "a

[3] See Department of Defense Directive No. 1300.6, ASD(M) (Aug. 21, 1962); Army Regulation No. 635-20 (Nov. 9, 1962); Department of the Navy, Bupers Instruction 1616.6 (Nov. 15, 1962); Marine Corps Order 1306.16A (Oct. 16, 1962); Air Force Regulation No. 35-24 (March 8, 1963).

merely personal moral code" as a basis for exemption. See *United States* v. *Seeger,* 380 U.S. 163.

Finally, even if the local board's refusal to reopen petitioner's classification were relevant in some way to his prior refusal to submit to induction, the board's decision was not based on Regulation 1625.2, as petitioner suggests. Rather, after reviewing petitioner's claim, the board decided that "the facts presented do not warrant the reopening or reclassification of your case" (S. 72). The board's decision, therefore, was entirely consistent with *Gearey* which held only that reopening could not be denied under Regulation 1625.2 where the claim for exemption matured after notice of induction.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General,
FRED M. VINSON, JR.,
Assistant Attorney General,
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

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